## TAN CHOON SENG v. YANG KAM HAH

[F.C. Azmi L.P., Suffian & Gill F.JJ.) November 28, 1969]

[Johore Bahru — Federal Court Civil Appeal No. X.72 of 1968]

*Tort — Negligence — Duty of employer — Failure to provide safe system of work — Contributory negligence.*

*Master and Servant — Safe system of work — Duty of employer.*

The plaintiff/respondent was employed by the defendant/appellant as a lorry attendant and was engaged together with the driver of the lorry in loading logs into the lorry. The method used in loading was by affixing a wire to the end of a log and then by means of a winch, the log would be dragged to the rear of the lorry and when in position the log would be pulled up on to the lorry over a ramp placed against the end of the vehicle. On the day of the incident it rained but the plaintiff and the driver continued the work. The plaintiff noticed that the ramp had shifted to one side. He thought it necessary to put the ramp again in its proper position and therefore shouted to the driver to stop the winch. The driver did so and the plaintiff approached the ramp and according to him the ramp then fell and with it the log. He was struck on the right foot and was injured. The learned trial judge held that in all the circumstances of the case the defendant had failed to provide an effective supervision to ensure that loading work should stop when conditions became wet and dangerous. On the question of contributory negligence he could find no evidence that the plaintiff was in any way to blame. The defendant appealed.

**Held,** dismissing the appeal: (1) the learned trial judge was right in holding that the cause of the accident was the failure of the defendant to provide effective supervision to ensure that the plaintiff did not unnecessarily expose himself to risk;

(2) in this case as the plaintiff in continuing to work after it had started to rain, was acting for the benefit of the defendant's business, it could not be said that any inadvertence on the part of the plaintiff amounted to contributory negligence.

*Case referred to:-*

(1) *Seng Chong Metal Works Ltd.* v. *Lew Fa* [1966] 2 M.L.J. 63 at p. 64.

FEDERAL COURT.

*H. B. Ball* for the appellant.

*D. H. Murphy* for the respondent.

*Cur. Adv. Vult.*

**Azmi L. P.:** The plaintiff was employed by the defendant as a lorry attendant, and together with the driver of the lorry were ordered on the day of the incident to load logs into a lorry.

It could not be seriously disputed now that the logs were being loaded on to the lorry that day according to the method normally used previously. The method was by affixing a wire rope to one end of a log and then by means of a winch, the log would be dragged to the rear end of the lorry and when in position the log would be pulled up on to the lorry over a ramp placed against the end of the vehicle. In reference to this incident whilst a third log was being pulled up the ramp, the plaintiff noticed that the ramp had shifted to one side. He thought it necessary to put the ramp right again in its proper position. He therefore shouted to the driver to stop the winch. The driver did so. The plaintiff approached the ramp and according to him, the ramp then fell and with it the log. He was struck on the right foot and was injured.

In his evidence, the plaintiff further stated that he was struck because he was slow in moving away. The learned judge came to the view that but for the wet and slipped ground the accident would not have happened. The learned judge in reference to this however, went on to say "...I do not think that the defendant can be heard to say that the plaintiff realizing the danger of working in wet conditions should have stopped." He then went on to point out that it was for the good of the defendant's business and also for the plaintiff that as many logs as possible be loaded within a particular time. In those circumstances, went on the judge, the defendant must have been aware that the plaintiff, regardless of the danger involved would do his best to deliver as many logs as possible but then it was the duty also of a master to take reasonable care for the safety of its workpeople in all the circumstances of the case so as not to expose them to unnecessary risk. The learned judge came to the view that in all the circumstances of this case the defendant had failed to provide an effective supervision to ensure that loading work should stop when conditions became wet and dangerous. On the question of contributory negligence, he could find no evidence that the plaintiff was in any way to blame.

The defendant appeals.

It was argued on behalf of the defendant that there was evidence to support the allegation that the injuries to the plaintiff were caused or contributed to by the negligence of the plaintiff. First, the plaintiff admitted he had no experience of loading logs when it rained and when it rained he would not work. It was also pointed out that according to the Forest Officer when the ramp fell the plaintiff had one hand on the ramp and the other on the log and this was a dangerous thing to do. The plaintiff himself denied doing this and all that he said was that he was standing near when the log fell.

In his judgment the learned judge did not refer to the evidence of the Forest Officer on this point. He merely referred to the plaintiff's own evidence that the ramp fell and with it the log as he (plaintiff) was approaching. The learned judge attributed the cause of the accident to the slippery and wet condition of the ground and that it had been the practice to the knowledge of the defendant's supervisor to use the ramp in the manner employed on the day of the accident, for some time previously. He however, came to the view that the defendant could not be heard to say that the plaintiff realizing the danger of working in wet conditions should have stopped because, in continuing to work after it had started to rain, the plaintiff was acting for the benefit of defendant's business and the defendant must have been aware that the plaintiff regardless of the danger involved would do his best to deliver as many logs as possible. In my view the plaintiff was like the plaintiff in the case of *Seng Chong Metal Works Ltd.* v. *Lew Fa*.[1] Of the plaintiff there Thomson L.P. said:—

"If then the plaintiff was engaged in operating the machine he was operating it for his employer's benefit and it seems to me difficult to suppose that any inadvertence on his part could have gone beyond this: that he was concentrating more on his work for his employer than on his own safety. In the circumstances I am not prepared having regard to the policy of the law which of course, is to protect workmen operating potentially dangerous machinery, to say any inadvertence on the part of the plaintiff amounted to contributory negligence as we understand that expression."

The learned judge in the present case however, considered that the cause of the accident was the failure of the defendant to provide effective supervision to ensure that the plaintiff did not unnecessarily expose himself to risk. It was apparent that in this case the plaintiff and the lorry driver were left entirely to their own devices as to how the loading of the logs was to be carried out, whether to stop or to continue working when it rained.

I am inclined to the view that on the evidence given it could not be said that the plaintiff was to be blamed at all. I would therefore dismiss the appeal with costs. The deposit of $500 is to be paid to the respondent towards his taxed costs.

**Suffian** and **Gill F.JJ.** concurred.

*Appeal dismissed.*

Solicitors: *Allen, Gledhill & Ball; Murphy & Dunbar.*

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## NAYAR v. GIAN SINGH & CO. LTD.

**[F.C. (Azmi L.P., Suffian & Ali F.JJ.) November 28, 1969]**

**[Kuala Lumpur — Federal Court Civil Appeal No. X-44 of 1969]**

*Practice and Procedure — Amended statement of claim — Whether has to be signed by solicitor — Whether a pleading — R.S.C., 1957, O. 19 r. 4 and O. 71 r. 1 (10).*

The question raised in this case was whether an amended statement of claim in an action is a fresh pleading and therefore must be signed by the solicitor for the plaintiffs as required by R.S.C., O. 19 r. 4.

**Held:** an amended statement of claim is not a fresh pleading and therefore need not be signed by the solicitor for the plaintiffs.

*Cases referred to:-*

(1) *The Queen* v. *Cowper* (1890) 24 Q.B.D. 533.

(2) *Re Pritchard, Decd.* [1963] Ch. 502.

(3) *Maclaine Stokvis (Malaya) Ltd.* v. *Saloma Co.* [1959] M.L.J. 241.

(4) *Fick & Fick Ltd.* v. *Assimakis* [1958] 3 All E.R. 182.

(5) *Great Australian etc. Co.* v. *Martin* (1877) 5 Ch. D. 1.

The following cases were also cited in argument: *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152, 159; *Anlaby* v. *Praetorius* (1888) 20 Q.B.D. 764.

In the court below the following judgment was delivered on March 25, 1969:

**Ibrahim J.:** On 19th June 1962 the plaintiffs commenced action by way of a writ of summons specially indorsed with the statement of claim pursuant to O.3 r.6 of the Rules of the Supreme Court, 1957, claiming from the defendant the sum of $26,619.52 being the amount found to be due from the defendant to the plaintiffs on accounts stated between them in writing in a document signed by the defendant and dated 14th day of December, 1960. In compliance with O.3 r.1 their solicitors signed the indorsed statement of claim. The defendant entered appearance and filed his statement of defence within the prescribed time.

On an application made by the plaintiffs the court on 2nd September 1966 by consent of the parties ordered that "the plaintiffs be and are hereby at liberty to amend the writ of summons in the manner shown in red on the copy writ and indorsement of claim delivered with the summons in chambers No. 71 of 1966 and that the defendant be and is hereby at liberty to amend his defence within fourteen days from the 2nd of September, 1966 without prejudice to the defendant's rights to raise by his defence any points open to him." The order was made under O.28 r.1.

On 6th September 1966 the plaintiffs presented to the Assistant Registrar copies of the original writ amended as ordered by the court with the following request made in the form of a *praecipe:*

"Please amend the indorsement of claim on the original writ of summons under 0.28 r. 8 in the manner shown in red on the copy writ of summons and indorsement of Claim delivered with Summons in Chambers No. 71 of 1966 (now in Court file) and mark it with the date of the abovementioned order and the day on which the amendment is made under 0.28 r. 9 or permit the amendment to be made by the delivery herewith of the copy of the writ as amended.

Please issue copy of amended Writ to us for delivery to the defendant within the time allowed for amending the same under 0.28 r. 10."

The Assistant Registrar did not amend the indorsement of claim on the original writ but certified the amendment on the copies of the writ as amended which were presented to him as follows: —

"Amended this 6th day of September, 1966 pursuant to order of court made the 2nd day of September, 1966

Sd. Hakam Singh Gill
Asst. Registrar,
High Court, Malacca."

They were sealed with the seal of the court.

The amendment was only in respect of the indorsed statement of claim and the amended statement of claim reads as follows: —

"STATEMENT OF CLAIM

The plaintiffs' claim is for $26,619.52 being the amount found to be due from the defendant to the plaintiffs on accounts stated between them in writing in a document signed by the defendant and dated the 14th day of December 1960 with interest.

In the alternative for $26,629.52 being the amount due from the Defendant to the plaintiffs pursuant to paragraph 3 of a lease dated 20th January, 1959.

PARTICULARS

~~1960 December 14th Amount due as aforesaid $26,619.52~~

Balance as per statement of account dated 21.7.60 delivered to the defendant $42,249.42